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No. 84-495
In the Supreme Court of the United States
October Term, 1984

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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Richard Thornburgh, H. Arnold Muller, Helen B. O'Bannon, Michael I. Browne, William R. Davis, LeRoy S. Zimmerman, personally and in their official capacities, and Joseph A. Smyth, Jr., personally and in his official capacity, together with all others similarly situated,

Appellants

v.

American College of Obstetricians and Gynecologists, Pennsylvania Section, Henry H. Fetterman, M.D., Thomas Allen, M.D., and Francis L. Hutchins, Jr., M.D. on behalf of themselves and all others similarly situated; Allen J. Kline, D. O., on behalf of himself and all others similarly situated; Brooks R. Susman, Paul Washington; Morgan P. Plant, on behalf of herself and all others similarly situated; Elizabeth Blackwell Health Center for Women, Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counseling Center; and Women's Health Services., Inc.,

Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

Brief for an Ad Hoc Group of Law Professors as Amici Curiae in Support of Appellees

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50 pp

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In the Supreme Court of the United States
October Term, 1985

No. 84-495

Richard Thornburgh, et al., Appellants

v.

American College of Obstetricians and Gynecologists, et al., Appellees

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No. 84-1379

Eugene F. Diamond, et al., Appellants

v.

Allan G. Charles, et al., Appellees

On Appeal From the United States Courts of Appeals for the Third and Seventh Circuits

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Brief for an Ad Hoc Group of Law Professors As Amici Curiae in Support of Appellees

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CONSENT OF PARTIES

Amici curiae file this brief with the consent of all the parties in support of the position advanced by the appellees.

INTEREST OF AMICI CURIAE

Amici Curiae are the individuals listed who compose an ad hoc group of professors teaching at various American law schools. The group represents a cross section of views and diverse interests. Amici all recognize the importance and emotional timbre of the issues raised in this case. They, however, believe that these issues should not be resolved at the expense of impugning the integrity of the federal judicial process simply because of the zealousness and fervor surrounding their public debate. Amici recognize and support the logical and orderly procedural flow of litigation, as well as adherence to constitutional requirements for the exercise of appellate jurisdiction. Amici, therefore, urge this Court to dismiss these cases for lack of jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than a decade has passed since this Court's land-mark decision in Roe v. Wade, 410 U.S. 113 (1973) (hereafter Roe) articulated the fundamental constitutional protection of a woman's right to obtain an abortion. In the intervening years, this Court consistently has reaffirmed its position in a succession of cases challenging the practical application of the tenets of Roe.[1] These two cases once more appear to question this Court's strength of conviction in its interpretation of Roe in several

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1/ See Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981).

recent similar decisions.[2] This appearance, however, is deceptive and illusionary. Both of these cases are improperly before this Court. Appellants have failed to satisfy fundamental requirements necessary for the exercise of appellate jurisdiction by this Court.

In Thornburgh, appellants, in their zeal, seek to disrupt the logical and orderly procedural flow of litigation by having this Court abandon the century long practice of restricting review on appeal from a Circuit Court of Appeals decision to only those cases involving final judgements. In addition, because of intervening circumstances, that specific part of the appeal seeking review of the Parental Consent/Judicial Approval provi-

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2/ Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

sions, §3206 of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Am. §§3201-3220 (Purdon 1983) (hereafter the "Pennsylvania Act") presently is moot as a matter of appellate review and ripe for review by the District Court.

Similarly, in Diamond, there is no live case or controversy for the exercise of federal judicial power. Appellants, District Court intervenors, lack the requisite standing necessary to bring the case to this Court. The District Court order granting appellants the right to intervene in the first place is not dispositive of whether they now have standing. None of the originally named party-defendants, governmental officials representing the State of Illinois, have filed an appeal or adopted appellants' brief in this case. In fact, all of the state representatives have been realigned as appellees in the case before this Court.

I. TRADITIONAL PRINCIPLES OF FINALITY OF JUDGMENTS REQUIRE DISMISSAL OF THE APPEAL UNDER 28 U.S.C. §1254(2) OF PART OF AN INTERLOCUTORY ORDER ISSUED BY THE CIRCUIT COURT OF APPEALS IN THORNBURGH

This case was brought to the Circuit Court of Appeals on cross-appeals from a District Court order, entered on a hastily stipulated record, denying a substantial, but not total, part of plaintiff's request for a preliminary injunction of the Pennsylvania Act. The case was twice briefed, as well as orally argued. In between, this Court announced its decisions in three factually similar cases, Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983), Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)and Simopoulos v. Virginia, 462 U.S. 506 (1983). After thoughtful and methodical consideration, the Circuit Court of Appeals finally concluded that certain

sections of the Pennsylania Act were unconstitutional as a matter of law as written. The original denial of the preliminary injunction was reversed in part and the case was remanded to the District Court "for further proceedings in accordance with [its] opinion." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 304 (3rd Cir. 1984). Judgement was not entered for the plaintiffs. Significant parts of the Pennsylvania Act still require District Court review during which both plaintiffs and defendants may engage actively in trial litigation by offering additional evidence and legal arguments. The Commonwealth of Pennsylvania has not appealed certain issues but reserved them for further litigation before the Distict Court. (E.g. §3205(a)(2) of the Pennsylvania Act.) Since the Circuit Court of Appeal's order, plain-

tiffs have renewed their motion before the District Court for a preliminary injunction of additional provisions of the Pennsylvania Act. A full evidentiary hearing has been held and a final hearing on the merits should be scheduled shortly. The District Court decision on these and other matters undoubtedly will be appealed to the Circuit Court of Appeals and, probably, to this Court, as well.

The complicated and fragmented procedural posture of the case, argues in persuasive decibels, that the interlocutory order of the Circuit Court of Appeals clearly lacks the degree of finality required for the exercise by this Court of mandatory appellate jurisdiction under 28 U.S.C. §1254(2) (hereafter §1254(2)).

This Court consistently has required that appeals can be taken only from final judgments of the Circuit Court of Appeals to the United States Supreme Court.

> Under the Act of February 13, 1925 [the Amended Judicial Code of 1925], §240(b) [the predecessor to §1254(2)] appeals to this Court from Circuit Court of Appeals lie only from final judgments or decrees in cases where the validity of a state statute is drawn in question on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is against its validity. (citations omitted)

Slaker v. O'Conner, 278 U.S. 188, 189-190 (1929). This finality requirement was read directly into §1254(2) in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). Neither case has been overruled and clearly are controlling precedent here.[3]

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[3]/Neither New Orleans v. Dukes, 427 U.S. 297 (1976), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), El Paso v. Simmons, 379 U.S. 497 (1964) (per curiam) nor Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77 (1958), reached the merits of the issue presently before the court. In any event, all four cases are factually distinguishable.

It is neither surprising nor confusing that §240(b) of the amended Judicial Code of 1925 and 28 U.S.C. §1254(2) contain no explicit finality language. The final judgement requirement within the federal court system finds its historical roots in the practice of the common law in the courts of England[4] and in the first Judiciary Act of 1789, 1 Stat. 73, c. 20 §22. Finality has been deemed a longstanding rule of procedural practice implicit in all prior acts of Congress, equally silent in their terms on this matter, related to United States Supreme Court appellate jurisdiction. See generally, Crick, The Final Judgement as a Basis for Appeal, 41 Yale L.J. 539 (1932). When the

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4/E.g. Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615); U.S. v. Girault, 52 U.S. 22 (1850); Holcombe v. McKusick, 61 U.S. 552 (1857).

Circuit Courts of Appeal were created by the Evarts Act of March 3, 1891, 26 Stat. 826, this Court reaffirmed in clear and unmistakable terms the applicability of the final judgement requirement for access to the United States Supreme Court by appeal.

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error,... have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 6 How. 201, 204. The Construction [of non-finality] contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed. . . .
> . . .[T]he distribution of the entire appellate jurisdiction of our national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, . . . by designating the classes of cases in respect of which each of those two courts

shall respectively have final jurisdiction. . . . [T]here is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word final . . . should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, ... to this court, independently of any final judgment upon them. The

> effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, ... by awaiting the final judgment, could be promptly decided in one appeal.

McLish v. Roff, 141 U.S.661,665-667 (1891).

§1254(2), as originally enacted as §240(b), was an amendment to the Judge's Bill of 1925 drafted by Justices deeply concerned about the U.S. Supreme Court's caseload. John Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 299 n.7 (Fall, 1978), James F. Blumstein, The Supreme Court's Jurisdiction - Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 898-899 (1973); F. Frankfurter and J. Landis, The Business of the Supreme Court, 273-278 (Johnson Reprint Corp., N.Y. 1972). §240(b) was a Senate compromise measure designed to place circuit courts of

appeal and state courts, pursuant to §237(a), 43 Stat. 937 (now 28 U.S.C. §1257(a)), in "perrect parity, allowing a writ error from the circuit court of appeals under conditions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." Frankfurter and Landis, supra. at 278 (citing Sen. Walsh, 66 Cong. Rec. 2923); see also Simpson, supra. at 313. While §237(a), directed to state courts with varying appellate practices, explicitly required finality, §240(b) merely reflected codification of historical federal court practice.[5]

[5/] This comparison is not intended to imply any other similarity of requirements under these statutes.

The finality requirement, for some time, has served as one of a number of measures aimed at relieving the burden of the Supreme Court caseload by reducing the number of cases requiring mandatory appellate review. Congressional policy has been to restrict the mandatory appellate jurisdiction of the U.S. Supreme Court.[6] This Court has recognized

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[6]/The Evarts Act, Act of March 3, 1891, 26 Stat. 826, established the federal Circuit Courts of Appeal and U.S. Supreme Court certiorari authority over certain cases. The Act of September 6, 1916 Ch. 448, 39 Stat. 726, provided a right of appeal to the U.S. Supreme Court from state court only where a federal statute, treaty, authority or right was struck down or a state statute upheld against federal challenge. The Act of February 13, 1925, Ch. 229, 43 Stat. 936, the Judge's Bill of 1925, widely substituted certiorari review for a significant part of U.S. Supreme Court mandatory appellate jurisdiction. The Act of August 12, 1976, 90 Stat. 1120, by repealing 28 U.S.C. §§ 2281, 2282 and 2403, abolished direct appeals to the United States Supreme Court from most three-judge district courts.

the Congressional policy. Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), Flanagan v. United States, __ U.S. ___, 104 S.Ct. 1051, 1054 (1984) and has followed it strictly when interpreting statutes authorizing appeal, Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 43 (1983). In fact, Congress, this Court, and numerous legal commentators have all pressed for yet further restrictions in the mandatory appellate jurisdiction of the Supreme Court.[7]

To ignore the lack of finality of the Circuit Court of Appeals order before the Court is likely to produce negative consequences beyond the scope of this case. The recent repeal of the three-judge district court statutes was designed to eliminate direct appellate access to the United States

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[7]/See, Simpson, supra. at 298-300, fns. 7-13, for a detailed listing of authorities.

Supreme Court, in cases challenging the Constitutionality of state statutes (Simpson, supra., at 299 fn. 7). Any diminution in the finality requirement under §1254(2), much less a wholesale abandonment of the requirement in this case, certainly would defeat the purpose of the Congressional repeal. Most cases previously heard by three-judge panels would wind up before the U.S. Supreme Court on mandatory appeal. Since many of these cases often involve the grant or denial of interlocutory relief pending the outcome of final litigation, it is not inconceiveable that many of these cases probably would come before this Court more than once.

The appeal in this case also underscores the fact that broader systemic process interests are served by the final judgement rule. By preventing piecemeal U.S. Supreme Court review of discretionary interlocutory orders, disruption and delay of trial court func-

tions, as well as strain on the judicial system and the parties is minimized. Flanagan v. U.S., ___ U.S. ___, 104 S. Ct. 1051, 1054 (1984); Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). This case is a textbook example of piecemeal litigation and all its attendant problems. Aspects of this case can be found at every level of the federal judicial system, virtually insuring that additional issues in this case will be appealed at some future date to this Court. The integrity of the federal judicial system, as well as Congressional intent to restrict mandatory appeals to the U.S. Supreme Court are best served by application of the final judgement rule to dismiss this appeal.

II. THE SUPERVENING ENACTMENT OF PENNSYLVANIA ORPHANS' COURT RULE 16 REQUIRES VACATING, AS MOOT, THE APPEAL FROM THAT PORTION OF THE CIRCUIT COURT OF APPEAL'S ORDER IN THORNBURGH ENJOINING THE ENFORCEMENT OF §3206 OF THE PENNSYLVANIA ABORTION CONTROL ACT ON PARENTAL CONSENT OR JUDICIAL APPROVAL FOR MINORS

The judicial power of the federal courts is limited by the case or controversy requirements of the United States Constitution, Article III §2 (hereafter Article III) and related doctrines of justiciability, such as mootness.

DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (citing Liner v. Jafeo, Inc., 375 U.S. 301, 306 fn. 3 (1964); United States Parole Commission, et al. v. Geraghty, 445 U.S. 388, 395-96 (1980). The mootness doctrine addresses circumstances destroying the justiciability of a case otherwise previously appropriate for determination by a Court. A case or controversy must remain alive

throughout every stage of appellate review. Kremens v. Bartley, 431 U.S. 119, 128 (1977); Preiser v. Newkirk, 422 U.S. 395, 401-404 (1975). Such determinations of justiciability require this Court to review lower court orders on appeal in light of presently existing law not that in effect when judgement was entered. Fusari v. Steinberg, 419 U.S. 379, 388 (1975); Cort v. Ash, 422 U.S. 66, 74-76 (1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972); Hall v. Beals, 396 U.S. 45, 48 (1969); United States v. Alabama, 396 U.S. 602, 604 (1960). A finding of mootness is appropriate when supervening legislation specifically eliminates the original basis for lower court action. Attwell v. Nichols, 608 F.2d 228, 230-231 (5th Cir. 1979), cert. denied 446 U.S. 955 (1980).

The Third Circuit Court of Appeals enjoined the enforcement of §3206 of the

Pennsylvania Act, providing for parental consent or judicial approval for unemancipated minors to obtain an abortion, only until regulations were promulgated containing detailed provisions assuring confidentiality and dispatch. American College of Obstetricians and Gynecologists, et al., v. Thornburgh, et al., 737 F.2d 283, 296-297 (3rd Cir. 1984). On November 26, 1984, the Pennsylvania Supreme Court adopted new rules. Effective immediately, New Pennsylvania Orphans' Court Rule 16 (hereafter Rule 16) provided, inter alia, for confidentiality and dispatch of proceedings under §3206. By its own terms, the Circuit Court of Appeals injunction §3206 then expired. As a consequence, the basis for appellate review also disappeared.

The constitutionality of Rule 16 should not be considered by this Court at this time. The Circuit Court of Appeals clearly stated:

> Although we do not invalidate §3206, its operation should be enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action if still pending, or in some future action, that the regulations are unconstitutional.

American College of Obstetricians and Gynecologists et al., v. Thornburgh et al., 737 F.2d 283, 297 (1984).

No lower court has passed on the question of the constitutionality of Rule 16. The Federal District Court is the appropriate forum for initial review of and judgement on this Rule. Significant portions of this case already currently are pending before that court on remand from the Circuit Court of Appeals. District Court review, therefore, will not unfairly or unreasonably delay final judgement in this case. There presently is no factual record addressing the provisions of the Rule. Nor has either side had a full opportunity to develop legal arguments. This

case is before the Court on the parties' District Court stipulation of uncontested facts submitted on November 30, 1982. Even the Circuit Court of Appeals was not able to review the substantive constitutionality of the Rule by the time its May 31, 1984 order was entered, or when it denied rehearing June 28, 1984.

Rule 16 was not even promulgated until November 26, 1984.

In addition, this Court recently has provided authoritative guidance to District Courts on the very issue of the constitutionality of parental consent provisions. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 476 (1983, Planned Parenthood Association v. Asncroft, 462 U.S. 467 (1983). Application of these and other Supreme Court precedent is not merely a matter of law.

> [t]he Missouri statute upheld in Ashcroft establishing alternative court proceedings for minor consent contained detailed provisions assuring confidentiality and dispatch, establishing a clear and simple procedure for the minor to follow in setting forth her petition, and directing court personnel to assist the minor in preparing the petition. Comparable provisions are absent in the Pennsylvania statute. This difference is critical. To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form.

American College of Obstetricians and Gynecologists et al. v. Thornburgh, et al., 737 F.2d at 297.

The standard disposition in a federal civil case that has become moot pending appeal "is to reverse or vacate the judgement below and remand with a direction to dismiss." United States v. Munsingwear, 340 U.S. 38, 39 and fn. 2 (1950). While that part of the Circuit Court of Appeals order enjoining §3206 should be found moot and

vacated, circumstances clearly warrant further evidentiary consideration of the constitutionality of Rule 16 upon remand to the District Court. See, in accord: United Building and Construction v. Council of Camden, ___ U.S. ___, 104 S.Ct. 1020, 1030 (1984); Hill v. Printing Industries of Gulf Coast, 422 U.S. 937, 938 (1975) (per curiam); White v. Regester, 422 U.S. 935, 936 (1975) (per curiam); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 415 (1972).

III. THE LACK OF AN ARTICLE III §2 LIVE CASE OR CONTROVERSY IN DIAMOND REQUIRES THIS COURT TO DISMISS THE APPEAL

Article III §2 requires a live case or controversy for the exercise of federal judicial power.

> a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such

> that judicial determination is consonant with what was, generally speaking, the business of the... Courts... when the Constitution was framed.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (concurring opinion) (1951); see also, United Steelworkers of America v. U.S., 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring).

Plaintiffs could never have sued appellants, District Court intervenors, in this case. Plaintiffs brought this case under 42 U.S.C. §1983 (hereafter 1983) challenging the constitutionality of the provisions of the Illinois Abortion Law of 1975 as amended, October 30, 1979, S.H.A. Ill. Ch. 38 §81-11 to §81-34 (Smith-Hurd Supp. 1982) (hereafter the Illinois Act). Some form of state action is a prerequisite to asserting and maintaining jurisdiction under §1983. Official actions of representatives of a state, actions in concert with

such representatives or actions under color of state law are required. Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 928-930 (1982); Parratt v. Taylor, 451 U.S. 527, 535 (1981). Review of the appellants' motion in support of their petition to intervene reconfirms that they sought to protect personal and private "professional interest[s] in statutory restrictions on abortion." (Motion to Intervene and Petition for Appointment of Guardian Ad Litem) (hereafter Motion to Intervene). Appellants are not state officials nor have they acted in concert with the state or under color of state law. In fact, appellants have admitted this. They have denied any liability for the amount of attorney's fees awarded to plaintiffs by the District Court (Motion to Amend the Judgement Pursuant to Fed.R.Civ.P. 59(E) at §10) (hereafter Motion to Amend).

The Illinois Act in this case is a criminal statute. It provides for criminal prosecution and/or fines for violation of its terms. S.H.A. Ill ch. 38 §81-26 and §81-31. Criminal statutes can not be enforced by private citizens. Only the state, through its official representatives, may enforce, and by implication, defend a criminal statute. Bordenkircher v. Hayes 434 U.S. 357, 365 (1978); U.S. v. Batchelder, 442 U.S. 113, 125 (1979) The State of Illinois has not appealed the Circuit Court of Appeals judgement to this Court. Nor has the State of Illinois adopted the appellants' brief or jurisdictional statement in this appeal.[8]

This Court's decision in Princeton Univer-

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[8]/See letter dated July 15, 1985 from Michael J. Hayes, Director of Advocacy, State of Illinois Attorney General to Mr. Alexander Stevas, United States Supreme Court Clerk of the Court. The State of Illinois has failed to comply with Supreme Court Rules 10.1-10.4, 10.6 and 34.1 or otherwise conduct itself like a party.

sity v. Schmid, 455 U.S. 100 (1982) is dispositive of the present case. The Court dismissed an appeal by Princeton University of a New Jersey Supreme Court reversal of a criminal trespass conviction. Schmid, a non-student defendant, was convicted of trespass for violating Princeton University regulations on University property. The University was asked to intervene before the New Jersey Supreme Court which then overruled the conviction on First Amendment grounds. The University filed a notice of appeal and a jurisdictional statement. The State of New Jersey joined in the University statement but did not file separately. It filed a brief asking this Court to decide the case but declined to take a position on the merits. The Court concluded that:

> Had the University not been a party to this case in the New Jersey Supreme Court and had the State filed a jurisdictional statement urging reversal, the existence of a case or controversy--and the

jurisdiction in this Court--could not be doubted. However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy. We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. See e.g., Sierra Club v. Morton, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364-1365, 31 L.Ed.2d 636 (1972); Flast v. Cohen, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Thus the presence of the State of New Jersey in this case does not provide a sound jurisdictional basis for undertaking to decide difficult constitutional issues.

Princeton University v. Schmid, 455 U.S. 100, 102 (1982)

See, in accord, City of Chicago v. Rapid Transit Co., 284 U.S. 577, 578 (1931).

In this case the State of Illinois has not even engaged in the minimal level of appellate participation previously found insufficient to invoke this Court's appellate jurisdiction.

Appellants, as private parties, lack the standing necessary to maintain this case. The District Court determination that intervention was appropriate is not conclusive. Standing requirements control whether a litigant is the appropriate party for advancing a particular legal claim. Warth v. Seldin, 422 U.S. 490, 500 (1975); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982); Flast v. Cohen, 392 U.S. 83, 99 (1968). Even if intervention once was appropriate, the constitutional inquiry into the propriety of a party's standing is a jurisdictional issue that may be raised at any time, even on appeal, or by this Court sua sponte. Regents of University of California v. Bakke, 438 U.S. 265, 281 fn. 14 (1978); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260 (1977).

> The constitutional dimension of standing theory, requires, at the very least, that there be an actual injury redressable by the Court.

Director, Office of Worker's Compensation Programs v. Perini North River Assocs., ___ U.S. ___, 103 S.Ct. 634, 640 (1983).

Appellants have no legally cognizable interest in the Illinois Act that should permit them to maintain this appeal. They have not demonstrated any concrete or direct injury from the continued enforcement of the Circuit Court of Appeals injunction of the Illinois Act. At best, appellants' personal and professional convictions may be offended. Similarly, enforcement of the Illinois Act can give appellants only personal gratification. Appellants simply do not have interests in this case significantly distinct from those they share in common with other citizens in the State of Illinois who may want to see the Illinois Act enforced.

Appellants could not have sued the State

of Illinois to compel enforcement of the Act. Private citizens who have no more than an abstract or intellectual interest in the enforcement or nonenforcement of state statutes consistently have been denied standing to sue. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484(1982); Simon v. Eastern Kentucky Welfare Organization, 426 U.S. 26, 40 (1976); Linda R.S. v. Richard D. et al., 410 U.S. 614, 617 (1976); Allen v. Wright, __ U.S. __, 104 S.Ct. 3315, 3325 (1984).

Similarly, criminal defendants regularly have been denied standing to invoke the United States Constitution Fourth Amendment rights of a third party. United States v. Payner, 447 U.S. 727, 731 (1980); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); Rakas v. Illinois, 439 U.S. 128, 141 (1978); Zurcher v. Stanford Daily, 436 U.S. 547, 553

(1978); Brown, et al. v. United States, 411 U.S. 223, 227 (1973).

Recent events merely underscore the inadequacy of appellants' legal interest in maintaining this case before the Court. On April 22, 1985, the District Court held appellants jointly and severally liable to plaintiffs for over $100,000.00 in attorney's fees. Appellants responded by filing a Motion to Amend the Judgement to dismiss the present appellants and name Americans United for Life, Inc. (hereafter AUL) as the sole intervening defendant. In the alternative, they want the court to clarify the original intervention order by stating "that AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." (Motion to Amend at §7). This motion to amend or clarify was based on the discrepency between the original Petition to Intervene in which appellants were named and the District

Court Order to Intervene in which AUL alone was named as intervenor. The Motion acknowledges that the present appellants were solicited by AUL to intervene in this case, but "AUL is the real party in interest." (Motion to Amend at §9). In addition, on June 28, 1985, counsel moved, pursuant to FRCP 25(a) to substitute AUL for appellant, Dr. Jasper Williams, who died in a recent plane crash. This motion presently is under consideration by the District Court. There is little likelihood that the Court will grant either of these motions. In a case challenging the recent additional amendments to the Illinois Act, the Seventh Circuit Court of Appeals affirmed a denial of both mandatory and permissive intervention to an organization similar to the AUL.

> In summary, then, IPC has presented no direct and substantial interest that can be secured by its participation in this lawsuit. Neither its interests as lobbyist, guardian of fetal rights, nor

> potential adoptive parents of adopted fetus "born alive," either separately or together, support its right to intervene in this lawsuit. The district court's finding that IPC failed to establish a significant, legally protectable interest, is, therefore, affirmed.

Keith v. Daley and Illinois Pro-Life Coalition, No. 84-2860, slip op. at 11 (7th Circuit Court of Appeals, June 18, 1985).

The consequences of recognizing the appellants in this case extend beyond the obvious distortion of several doctrines of justiciability. This Court recently has attempted to clarify the parameters of the state action doctrine. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922 (1982); Brooks v. Flagg Brothers., Inc., 436 U.S. 149 (1978); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). These events would be stymied by a decision to review this case on appeal.

CONCLUSION

The Court must not let the urgent and pressing nature of the issues presented in these cases compromise the appellate process. Access to appellate review by this Court is a venerable and precious, but all too fragile, right. We urge the Court to recognize that there is an approprite time and place for every case to be heard. In the present cases, however, it is neither the time, nor, this Court, the place for decision. We urge the Court to dismiss the appeals in both cases for lack of jurisdiction.

Respectfully submitted,

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